

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	Docket No. AO,F&V,983,2; FV 02,983,01
)	
Pistachios Grown in California;)	
Hearing on Proposed Marketing)	
Agreement and Order No. 983)	

BRIEF OF THE PROPONENTS COMMITTEE
IN SUPPORT OF A FEDERAL MARKETING ORDER
FOR CALIFORNIA PISTACHIOS

Kendall L. Manock #025932
Robert D. Wilkinson #100478
BAKER, MANOCK & JENSEN
5260 Norili Palm Avenue, Suite 421
Fresno, California 93704,2209
Telephone: (559) 432,5400
Facsimile: (559) 432,5620

Attorneys for THE PROPONENTS
COMMITTEE: FOR A FEDERAL
MARKETING ORDER FOR PISTACHIOS

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BRIEF IN SUPPORT OF A FEDERAL MARKETING ORDER FOR CALIFORNIA PISTACHIOS

INTRODUCTION

The Proponents Committee representing a cross section of the California Pistachio industry, its producers and handlers, urges the Secretary of Agriculture to take the necessary steps to issue a marketing order for the regulation of pistachios grown in California based on the record of the public hearing held July 23, 24 and 25, 2002. The record clearly establishes the need for an order to regulate the quality and size of pistachios to be sold in the United States through the establishment of maximum aflatoxin and defect levels and a minimum size enforced with mandatory inspections and reporting.

The record further establishes that:

- The handling of pistachios in California directly affects interstate commerce;
- The economic and marketing conditions of pistachios in California is such that the benefits of the proposed marketing order to producers, handlers and consumers far outweighs the relatively minor burdens; and
- The order as proposed in the notice and with the modifications suggested at the hearing would effectuate the purposes of the Agricultural Marketing Order Act (7 U.S.C. § 601 et seq.) by establishing and maintaining minimum standards of quality and inspection requirements that will provide orderly marketing and prevent of the disruption of the supply of pistachios to the market in the interest of producers, consumers and the general public.

The proposed Marketing Agreement and Order For Pistachios Grown in California published in the Federal Register on June 26, 2002 (Vol. 67 No. 123 at pp. 430-445) ("The Federal Register") contains the terms of the order supported by the Proponents with certain amendments offered at the hearing.

The testimony given at the hearing discussed in detail each of the sections of the proposal and the justification for the particular language used.

Many of the provisions of the proposal are found in all federal marketing orders. This brief will deal only with those provisions which are unique to the proposed order and which reflect the needs of the pistachio industry.

THE NEED FOR A FEDERAL MARKETING ORDER FOR CALIFORNIA PISTACHIOS

The need for the order is supported by the testimony presented by the Proponents. It shows that mandatory quality standards are essential to insure continuing consumer acceptance of California pistachios, and to increase demand to match increasing supply from increasing acreage. Quality standards are also necessary to meet the threat of adverse health threats which would severely effect the demand for pistachios to the detriment of the economy in general, and of farmers and consumers in particular.

Bill Phillimore who has been involved with the pistachio industry for over 25 years, testified how the industry has grown in the last 30 years from no commercial acreage to the fourth largest tree nut industry in the United States with an investment of more than \$1 billion in orchards and processing facilities, and over \$16 million invested in marketing and promotion through industry associations in the last few years. He testified how the industry is expecting a 60% growth in the next several years. To ensure a continued and growing demand from consumers to meet this increasing production, Mr. Phillimore testified that the existence of poor quality nuts must be controlled so that there will be a consistent high quality product flowing to the domestic marketplace. This goal can best be accomplished by a marketing order with regulations that would require sampling and testing to:

- Prevent small, defective, lower quality product entering the marketplace; and
- Ensure overall quality by limiting the presence of aflatoxin to safe levels

(Hearing record, p. 24)

Dr. David Eaton, Ph.D., Professor of Pharmacology and Toxicology on the faculty of the University of Washington and former President of the Society of Toxicology, testified about the toxic and carcinogenic properties of aflatoxin, how it occurs in pistachios, what the potential health hazards to humans could be, and that 15 parts per billion as a maximum tolerance would be a safe level that would protect the quality of pistachios for human consumption. (Hearing Record, pp. 67-104.)

Karen Reinecke, the President of the California Pistachio Commission which is charged with the promotion of California pistachios, conducting research and dealing with industry wide issues, testified about the devastating effect of public reaction to adverse publicity about substances in food which scares the consumers and reduces demand. She recounted examples of food scares such as those involving Washington apples, Mexican and California cantaloupe, ground beef, fruit juice and strawberries. In

particular, she recounted the 1997 European food scare involving aflatoxin in pistachios which reduced pistachio consumption in Europe from over 200,000,000 pounds in 1996 to 85,000,000 pounds in 1997. She explained that European consumption of pistachios today is still only around 100,000,000 pounds and continuing concerns regarding aflatoxin contaminated pistachios are expressed by the governments and consumers in New Zealand, Japan and other parts of the world. (Hearing Record, p. 163.) Based on her experience, Ms. Reinecke concluded that mandatory sampling and testing for aflatoxin in place before an aflatoxin scare occurred would be an extremely important tool for the industry to fall back on to counteract the effects of such a food scare. It would permit the industry to be proactive in publicizing the benefits of mandatory testing and minimize the adverse publicity if a food scare should occur by demonstrating that all California pistachios are tested before sale in the United States. (Hearing Record, pp. 171-172.)

ECONOMIC IMPACT OF THE PROPOSED ORDER

Almost all of the witnesses testified about the economic impacts of the proposed order, and agreed that the relatively small cost of implementing the order and its regulations was far outweighed by its benefits. Notably, much of this testimony that the benefit far outweighed the cost uniformly came from pistachio farmers who would ultimately pay for the regulation of defects, sizes and aflatoxin levels under the proposed order. (Hearing Record, Mike Woolf, p. 431; Bill Phillimore, p. 827.)

Dr. Daniel Sumner, Ph.D., a professor of Agriculture and Resource Economics at the University of California, Davis and a nationally recognized agricultural economist, thoroughly analyzed pistachio supply and demand, the cost of compliance with the proposal, and benefits from increased consumer confidence in California pistachios. Based on this analysis, he concluded that all segments of the pistachio industry, large and small growers and processors and the United States as a whole, would "have strongly, positive net benefits even with extremely conservative assumptions" and that "the public good aspects of the minimum standards provide benefits that could not be achieved without some form of collective action that would provide incentives for all members of the industry to contribute to dealing with potential aflatoxin problems and include group quality standards." (Hearing Record, pp. 793-794.)

All of the other witnesses who were producers or handlers, or both, confirmed their view that the benefits of the proposed order outweighed its burdens.

REGULATORY FLEXIBILITY ACT

Adequate evidence in the record of the hearing establishes that the requirements of the Regulatory Flexibility Act (5 U.S.C. § 601 et seq.) have been met and the impact on small businesses has been examined. The uncontradicted testimony of the smaller producers and the economist who testified was that the small producers will suffer little or no adverse impacts from the proposal and in any case the benefits will outweigh

the costs. (Hearing Record, Paul Couture, p. 635; Janice Lowder, p. 647; Karen Andrews, pp. 696-697; Daniel Sumner, p. 792.)

In addition, the proposal will afford smaller handlers of up to one million pounds, less expensive and simpler methods of sampling and quality testing. (7 CFR § 983.41)

AMENDMENTS TO THE PROPOSED ORDER
AS PUBLISHED IN FEDERAL REGISTER - JUNE 26, 2002

At the hearing on the proposed order, several amendments were offered by the Proponents to clarify certain provisions as follows:

DEFINITIONS

§ 983.11 *Districts*

The districts set forth in the Federal Register conform to the districts established for the California Pistachio Commission. These can be adjusted to conform with any changes which the California Pistachio Commission may institute upon the recommendation of the committee and approval of the Secretary. It is required that these changes be accomplished by informal rulemaking. (Hearing Record, p. 832.)

§ 983.27 *Production Year*

Production year is defined in the Federal Register as synonymous with the fiscal year and begins on September 1 and ends on August 31 of each year or such other period as may be recommended by the committee and approved by the Secretary. The Proponents recommend that any changes in the production year will be by informal amendment and not by formal rulemaking. (Hearing Record, p. 832.)

A question was raised at the hearing as to whether pistachios which were harvested at the end of the crop year in August would be included in the subsequent crop year or counted as part of the prior crop year. Because of the complications of setting assessments and because the nuts harvested in August are produced for the subsequent crop year, the Proponents recommend that the pistachios harvested in August be included in the subsequent crop year beginning September 1. (Hearing Record, p. 832.)

Based on this recommendation, the revised § 983.27 would read as follows:

Production year is synonymous with "fiscal period" and means the period beginning on September 1 and ending on August 31 of each year or such other period as may be recommended by the committee and approved by the Secretary. Pistachios harvested in

August of any year shall be counted as part of the subsequent production year.

ADMINISTRATIVE COMMITTEE

§ 983.32 *Establishment and Membership*

§ 983.33 *Initial Members and Nomination of Successor Members*

§ 983.34 *Procedure*

Sections 983.32, 983.33 and 983.34 of the proposed order deal with the operation of the administrative committee, which will administer the order and make recommendations to the Secretary.

The make-up of the committee is addressed in § 983.32 and § 983.33. These sections provide for the division of membership between handlers, producers and the public members, member's qualifications, and the restrictions on affiliations and representation. Because of the membership of the industry and the relative size of the largest producer and processor in the industry, the Proponents' recommendations as printed in the Federal Register limits any one producer or handler and their affiliates to no more than two (2) members and two (2) alternates. This is accomplished through the definition of "affiliation" (§ 983.3). It links producers and handlers who share control or a proprietary interest in the same legal entity that produces or handles pistachios grown in California. As Mr. Russ Waymire, a pistachio farmer and proponent, testified, the affiliation language is intended to reach all possible business relationships between two or more handlers or producers such as voting shares of stock, membership in a cooperative, partnership, joint venture, or contract (Hearing Record, p. 182.)

Mr. Bill Phillimore explained in his testimony that the affiliation could result from the shared ownership of a corporation by its shareholders, between two or more corporations and their respective shareholders, between a corporation and a cooperative and their respective shareholders, and members, or between the members of one or more cooperatives (Hearing Record, pp. 258-261, Exhibit 16, Attachment 2.) Mr. Phillimore testified that Attachment 2 to Exhibit 16 describes an affiliation that currently exists in the industry. (Hearing Record, p. 274.) It shows a combination of cooperatives in which all members of the two cooperatives who deliver more than 50% of their crop of pistachios to either cooperative will all be affiliated for the purpose of the limitation on membership of the administrative committee. Producers delivering to the cooperatives under contract who are not members and members who deliver less than 50% of their crop would not be affiliated for that purpose. (Hearing Record, p. 261.) It is the level of competition existing in the industry that convinced the Proponents to recommend a limitation on membership on the administrative committee to two members and two alternates from any one affiliated group. This resulted from lengthy negotiations between growers and handlers and the largest handler. For this reason the Proponents urge that

§ 983.32 which establishes this limitation, specifically the breakdown between handlers and between producers which is contained in § 983.32(e), should be subject to change only with formal rulemaking including notice and a full hearing (Hearing Record, p. 833.)

These administrative committee sections, 983.32, 983.33 and 983.34 contain definite language but nevertheless will need implementation through informal rules and regulations (Hearing Record, pp. 833-837, Exhibit 48.) Accordingly, the Proponents recommend that § 983.33(1)(5) be deleted and new subsection be added to § 983.33 to read as follows:

(n) The Committee, with the approval of the Secretary, may issue rules and regulations implementing §§ 983.32, 983.33 and 983.34.

REGULATIONS

§ 983.38 *Aflatoxin.*

Deletion of Decimal Point.

The Proponents and the experts who testified at the hearing recommend and support, as provided in the Federal Register, that the aflatoxin level in pistachios not exceed 15 parts per billion. (Hearing Record, pp. 95 and 140.)

First, wherever the decimal point appears in the Federal Register, i.e., "15.0", it should be eliminated so that it shows as "15". (See §§ 983.38(a), 983.38(d)(4) and 988.41(a)(2).) The decimal should also be removed from § 983.38(d)(4) of the Federal Register where there are two references to "5.0 ppb" and two references to "10.0 ppb" for samples required for testing. Again, the proper reference is "5 ppb" for sample 1 and "10 ppb" for sample 2.

As explained by Jeff Gibbons in his testimony, the elimination of the decimal is recommended so that the requirement will not be in conflict with the tests currently available which are only accurate to one part per billion. (Hearing Record, p. 349.)

2. Change in Aflatoxin Level.

Section 983.38(b) *Change in level* provides that the aflatoxin level specified in § 983.38 can be changed upon a recommendation to the Secretary by the Committee. The Proponents intend that the Committee's recommendation be based on at least seven concurring votes (Hearing Record, p. 841) and the Secretary's action should be based on informal rulemaking.

Accordingly, the Proponents recommend that the language of § 983.38(b) contain a specific reference indicating that the recommendation to change the aflatoxin level be made on the affirmative vote of seven concurring Committee members. This reference is consistent with the language of §§ 983.34(a)(2) and 983.46(a). (Hearing Record, pp. 841-842.)

Accordingly, the first sentence of § 983.38(b) in the Federal Register would be amended to read as follows:

(b) *Change in level.* The Committee, with the concurring votes of at least seven members, may recommend to the Secretary changes in the aflatoxin level specified in this section.

3. Testing of Pistachios.

The Proponents recommended at the hearing that the language of § 983.38(d)(3), as published in the Federal Register, be amended to give the Committee and the Secretary greater flexibility to approve methods of analysis for aflatoxin levels. Jeff Gibbons and Bob Kline, Ph.D., Research Director of the California Pistachio Commission, testified about correspondence between Dr. Kline and Anita Okrend, Chief of the Technical Services Branch, Science and Technology Programs, USDA, regarding the procedure used by the Department of Agriculture and the Secretary to approve of testing methods for contaminants such as aflatoxin. (Hearing Record, pp. 434-435 and 649-654, Exhibits 38, 39 and 40.) It is the Proponents' understanding that the AMS Technical Services Branch of the Science and Technology Programs will approve of the testing procedures, methods, and be responsible for accrediting laboratories to test for aflatoxin levels in pistachios. (Hearing Record, p. 654, Exhibit 40.)

Among the methods the Proponents anticipate would pass muster are High Pressure Liquid Chromatography (HPLC) and the Vicam Method (Aflatest). (Hearing Record, pp. 433-438.) As explained by Al Pohland, Ph.D., Director, Office of Governmental and International Activities, AOAC International, and former research chemist and international liaison on behalf of the Food and Drug Administration, the Aflatest is one of a number of commercial testing kits that are capable of validation and approval for testing for aflatoxin in pistachios. (Hearing Record, pp. 126-130.)

Section 983.38(d)(3), as amended by the Proponents at the hearing (see Exhibit 19), would read as follows:

(3) *Testing of pistachios.* Test samples shall be received and logged by an accredited laboratory and each test sample shall be prepared and analyzed using High Pressure Liquid Chromatograph (HPLC) and Vicam Method (Aflatest) or other methods as recommended by not less than seven (7) members of the committee and approved by the Secretary.

The aflatoxin levels shall be calculated on a kernel weight basis.

4. Sequential Testing.

The Proponents recommended amendments to the language published in the Federal Register describing the testing procedure for certifying lots of pistachios as negative for aflatoxin in § 983.38(d)(4). This modified procedure, with its revised tolerances, are based on a method proposed by Dr. Thomas Schatzki and on the method used by the peanut industry in the Peanut Marketing Agreement. (Hearing Record, pp. 444-447, Exhibit 19, Attachment G.) The procedure was reviewed by Dr. Pohland, who observed that “[t]he advantage of such a sequential sampling and analysis scheme is that most really good and bad lots will be rejected after the first sample is analyzed. If the experience gained with peanuts is any indication, this will result in a considerable reduction in the costs associated with controlling exposure to aflatoxins.” (Hearing Record, p. 131.) Dr. Pohland concluded that the proposed sequential testing scheme was an appropriate balance of the producers’ economic risk and the consumers’ health risk while assuring that pistachios were sold into the domestic market free of aflatoxin or with levels less than 15 parts per billion. (Hearing Record, pp. 132-133.)

In particular, the Proponents are recommending that if the first sample tests for aflatoxin at or below five parts per billion, the entire lot will be certified as negative. If the first test sample tests at or above 25 parts per billion, the entire lot fails and the handler will have to fill out a failed lot notification report as required under § 938.40. If the first test sample is above five parts per billion but below 25 parts per billion, the handler may elect to continue the testing process or voluntarily rework the entire lot. If the handler elects to go forward with testing, the second test sample will be analyzed and the result for the first and second sample will be averaged. The lot will be certified as negative if the laboratory determines that the average result is at or below 10 parts per billion. The lot will fail if the average result is at or above 20 parts per billion in which event the laboratory is required to fill out the failed lot notification report. In the event that the average level of the first and second sample is above 10 parts per billion and below 20 parts per billion, the handler again may withdraw the lot from testing and voluntarily rework it or proceed to test the third test sample. If the third test sample is tested, the results of the first, second, and third samples are averaged. The lot will be certified as negative as to aflatoxin if the average result is at or below 15 parts per billion. If the average result is above 15 parts per billion, the lot fails and the laboratory fills out the failed lot form as required under § 983.40. (Hearing Record, pp. 444-446, Exhibit 19, pp. 24-27.)

As noted, the proposed, revised language allows a handler to withdraw a lot from testing even if an earlier test result would permit continued testing. This allows handlers who are uncomfortable with any indication that their pistachios are contaminated with aflatoxin to rework their lots, even if they have not failed, before going to the expense of completing the testing protocol. (Hearing Record, p. 446.) Of

course, before the lot can be approved for domestic shipments, it must successfully complete testing.

The revised language, as proposed by the Proponents, § 983.38(d) (4) as amended by the Proponents at the hearing (see Hearing Record, Exhibit 19, p. 24), would read as follows:

(4) *Certification of Lots "Negative" as to Aflatoxin.* Lots will be certified as "negative" on the aflatoxin inspection certification if Test Sample # 1 has an aflatoxin level at or below 5 ppb. If the aflatoxin test of Test Sample # 1 is at or above 25 ppb, the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 983.40. If the aflatoxin level of Test Sample # 1 is above 5 ppb and below 25 ppb, the accredited laboratory may at the handler's discretion analyze Test Sample # 2 and the results of Test Samples 1 and 2 will be averaged. Alternatively, the handler may elect to withdraw the lot from testing, rework the lot, and re-submit it for testing after re-working. If the handler directs the laboratory to proceed with the analysis of Test Sample # 2, a lot will be certified as negative as to aflatoxin and the laboratory shall issue an aflatoxin inspection certificate if the averaged results of Test Samples 1 and 2 is at or below 10 ppb. If the averaged aflatoxin level of Test Samples 1 and 2 is at or above 20 ppb, the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 938.40. If the averaged aflatoxin level of Test Samples 1 and 2 is above 10 ppb and below 20 ppb, the accredited laboratory may, at the handler's direction, analyze Test Sample # 3 and the results of Test Samples 1, 2, and 3 will be averaged. Alternatively, the handler may elect to withdraw the lot from testing, re-work the lot, and re-submit it for testing after a re-working. If the handler directs the laboratory to proceed with the analysis of Test Sample # 3, a lot will be certified as negative as to aflatoxin and the laboratory shall issue an aflatoxin inspection certificate if the averaged results of Test Samples 1, 2, and 3 is at or below 15 ppb. If the averaged aflatoxin level of Test Samples 1, 2, and 3 is above 15 ppb., the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 983.40. The accredited laboratory shall send a copy of the failed lot notification report to the Committee and to the failed lot's owner within 10 working days of any failure described in this subdivision. If the lot is certified as negative as described in this subdivision, the aflatoxin inspection certificate shall certify the lot using a certification form identifying each lot by weight, grade and date. The certification expires for the lot or remainder of the lot after 12 months.

5. Retention of Records.

Section 983.38(d)(5) in the Federal Register provides that the records for each test for aflatoxin levels and for each final shipping disposition “must be maintained for three years. . .” For clarification and consistency, the Proponents recommend that the following phrase should be added: “. . . beyond the crop year of their applicability . . .” (Hearing Record, p. 848.) The entire last sentence of § 938.38(d)(5) would then read:

These records must be maintained for three years beyond the crop year of their applicability, and are subject to audit by the Secretary or the committee at any time.

§ 983.39 *Minimum Quality Levels*

Dyed or Color Coated Nuts.

Section 983.39 in the proposed order, as printed in the Federal Register, sets forth the maximum defects in pistachios shipped for domestic human consumption. Table 3, after § 983.39(a), shows the percent of maximum permissible defects by weight. Section 983.39(b) defines the defects listed in the table. One of the defects defined is “Dark Stain” (§ 983.39(b)(3)(iv)) with separate descriptions for “raw or roasted nuts” and another for “dyed nuts.” In the Federal Register, subparagraph (iv) reads as follows:

(iv) *Dark stain* on raw or roasted nuts means an aggregate amount of dark brown, dark gray or black discoloration affects more than one-eighth of the total shell surface or, on dyed nuts, when readily noticeable. Speckled discoloration on the stem end, bottom quarter of the nut is considered damage.

At the hearing, Randy Raber, testifying on behalf of Nichols Farms, objected to the external shell standards, asked that they be dropped entirely from the minimum quality standards in §983.39(b) and recommended that only the internal standards be retained. (Hearing Record, pp. 399-400.) He otherwise supported the order (Hearing Record, p. 401.)

After a recess and discussion off the record with the Proponents, Mr. Raber gave his full support to the proposed order if § 938.39(b)(3)(iv) was amended. (Hearing Record, p. 460.) He approved an amendment to subdivision (iv) (Hearing Record, p. 465, Exhibit 25) which deletes “or dyed nuts, when readily noticeable” and replaces that language with:

Pistachios that are dyed or color coated to improve their marketing quality are not subject to the maximum permissible defects for dark stain.

With this amendment, subsection 938.39(b)(3)(iv) as now recommended by the Proponents would read as follows:

(iv) *Dark stain* on raw or roasted nuts means an aggregate amount of dark brown, dark gray or black discoloration that affects more than one-eighth of the total shell surface. Pistachios that are dyed or color coated to improve their marketing quality are not subject to the maximum permissible defects for dark stain. Speckled discoloration on the stem end, bottom quarter of nut is not considered damage.

2. Table 4 - In Shell and Kernel Pistachio Lot Sampling Increments for Minimum Quality Certification.

Section 983.39(e)(1) states that Table 4 sets forth the weight of the inshell and kernel samples, and the number of samples, required to meet the minimum quality regulations. At the hearing, the Proponents recommended that Table 4 as published in the Federal Register be amended to eliminate the far right column, entitled "Weight of kernel test sample (grams)." The Proponents further recommended that the column second from the right in Table 4, entitled "Weight of inshell test samples (grams)" be retitled "Weight of inshell and kernel test samples (grams)." The Proponents recommended this change because it was their intention all along that the same test sample would be used for both inshell and kernel testing. As indicated in the testimony at the hearing, when testing inshell pistachios, the inspector would perform an internal kernel analysis if the pistachios exhibited dark stain, adhering hull, serious defects or if the pistachios otherwise, in the inspector's opinion, may have internal defects. In regard to lots of pistachio kernels, the weight of the samples analyzed for minimum quality certification would be the same as the weight of the samples for inshell pistachios. (Hearing Record, page 498-499, Exhibit 25, p. 5.)

With this amendment, Table 4 will appear as follows:

**Table 4-Inshell and Kernel Pistachio Lot Sampling Increments for
Minimum Quality Certification**

Lot weight (lbs.)	Number of incremental samples for the lot sample	Total weight of lot sample (grams)	Weight of inshell and kernel test sample (grams)
220 or less	10	500	500
221 - 440	15	500	500
441 - 1100	20	600	500
1101 - 2200	30	900	500
2201 - 4400	40	1200	500
4401 - 11,000	60	1800	500
11,001 - 22,000	80	2400	1000
22,001 - 150,000	100	3000	1000

3. Testing of Pistachios for Maximum Defects and Minimum Size.

Section 983.39(e)(2) published in the Federal Register requires that the sample taken to test for defects shall be analyzed according to USDA protocol. In the third sentence in that paragraph the word “currently” should be added after the words “The USDA protocol.” The corrected subdivision 983.39(e)(2) should then read as follows:

(2) *Testing of pistachios for maximum defect and minimum size.* The sample shall be analyzed according to USDA protocol to insure

that the lot does not exceed maximum defects and meets at least the minimum size levels as specified in Table 3 of this part. For inshell pistachios, those nuts with dark stain, adhering hull, and those exhibiting apparent serious defects shall be shelled for internal kernel analysis. The USDA protocol currently appears in USDA inspection instruction manual "Pistachios in the Shell, Shipping Point and Market Inspection Instructions." June 1994; revised September 1994, HU-125-9(b). Copies may be obtained from the Fresh Products Branch, Agricultural Marketing Service, USDA. Contact information may be found at <http://www.ams.usda.gov/fv/fvstand.htm>.

4. Retention of Quality Testing Records.

Section 983.39(f) provides for reporting of minimum quality testing. For clarification and consistency with § 983.49, at the hearing the Proponents recommended that the following phrase be added to the last sentence of the subdivision: "... following the production year in which the pistachios were shipped ..." (Hearing Record, p. 494, Exhibit 27, p. 4.)

The revised third sentence of § 983.39(f), as recommended by the Proponents, would read as follows:

These records must be maintained for three years following the production year in which the pistachios were shipped, and are subject to audit by the Committee at any time.

5. Testing.

§ 983.41 *Testing of Minimal Quantities*

At the hearing the Proponents recommended changes in the language of § 983.41 to clarify their intent. The Proponents recommended changes in the language of subparagraph (a) by eliminating the words "one of two" to allow small handlers to use both methods described in subdivision (a)(1) and (a)(2). In subdivision (a)(1), it is recommended that the words "before testing" should be eliminated and words should be added indicating that the handler could have his pistachios tested for aflatoxin "before further processing." This makes clear that small handlers will be allowed to test all of their hulled and dried pistachios before they are processed for quality and size. In regard to subdivision (a)(2), the Proponents recommended the elimination of the decimal point and the zero in reference to the tolerance of 15 ppb for the same reason that the identical change was recommended in regard to § 983.38, discussed above. The elimination of the decimal point was recommended because currently available tests are only accurate to one part per billion. Finally, the Proponents recommended that the reference to § 983.40

be changed to § 983.38. This change was recommended because § 983.38 sets forth the methods for testing for aflatoxin. (Hearing Record, pp. 514-516.)

Section 983.41(a) amended as proposed at the hearing (Hearing Record, Exhibit 29, p. 8), would then read as follows:

(a) *Aflatoxin.* Handlers who handle less than 1 million pounds of assessed weight per year, have the option of utilizing both of the following two methods for testing for aflatoxin:

(1) The handler may have an inspector sample and test all of the hulled and dried pistachios for the aflatoxin certification before further processing.

(2) The handler may segregate receipts into various lots at the handler's discretion and have an inspector sample and test specific lots. Any lots that have less than 15 ppb aflatoxin can be certified by the inspector to be negative as to aflatoxin. Any lots that are found to be above the 15 ppb may be tested after reworking in the same manner as specified in § 983.38.

6. **Identification.**

§ 983.44 *Inspection, Certification and Identification*

The Proponents recommended at the hearing that the language for § 983.44 published in the Federal Register be modified to eliminate the language indicating that the committee furnish the seals, stamps, tags, and other identification, and delete language indicating that the identification be affixed to containers under the direction and supervision of an inspector. As explained at the hearing, the Proponents recommended the change in language to provide for flexibility under the order by allowing handlers to affix the identification without direct supervision of an inspector. As testified to by Mr. Gibbons, Mr. Dave Szefflin, and Mr. Tom Saldaña, different handlers anticipate that they will test pistachio lots for aflatoxin and quality at different stages during processing. Moreover, some handlers will identify and trace lots by date and shift, while other handlers may mark containers with crayons or markers or, for the more technologically sophisticated handlers, by bar code. It is the Proponents' intention to allow for maximum flexibility while assuring compliance. (Hearing Record, pp. 560-562 (Mr. Gibbons' testimony), pp. 502-04, Exhibit 28 (Mr. Szefflin's testimony), p. 372-380 (Mr. Saldaña's testimony).)

Each of the handlers who addressed the issue of identification and tracing of pistachios indicated that he intended to explore alternative inspection programs

approved by the USDA such as the Partners in Quality (PIQ) Program or the Customer Assisted Inspection Program (CAIP). Each handler expressed interest in these programs because they allow greater flexibility for the handler's operations and reduce the cost for compliance with the order. (Hearing Record, pages 432-33 and 560-561 (Mr. Gibbons' testimony), pp. 505 and 507 (Mr. Szefflin's testimony), pp. 386-388 (Mr. Saldaña's testimony).) Mr. Michael Morelli, USDA AMS Federal Program Manager for Arizona, California, Nevada and Utah, and Mr. Rick Jensen, Branch Chief for the California Department of Food and Agriculture Inspection Program, described the approved alternative federal-state inspection programs, the PIQ and CAIP programs. (Hearing Record, pp. 474-476 (Mr. Morelli's testimony), pp. 534-540 (Mr. Jensen's testimony).)

The revised language of § 983.44, as recommended by the Proponents (Hearing Record, Exhibit 32, p. 2), would read as follows:

Upon recommendation of the committee and approval of the Secretary, all pistachios that are required to be inspected and certified in accordance with this part, shall be identified by appropriate seals, stamps, tags, or other identification to be affixed to the containers by the handler. All inspections shall be at the expense of the handler.

7. Minimum Quality.

§ 983.45 *Substandard Pistachios*

As a clarification, at the hearing the Proponents recommended the addition of a specific reference to § 983.39, regarding minimum quality requirements, to the language of § 983.45 regarding substandard pistachios. Notably, the requirement that the pistachios meet the minimum quality requirements was set forth in the language published in the Federal Register, however, there was no explicit reference to § 983.39 in § 983.45. (Hearing Record, pp. 567-568.)

The revised language of § 983.45 as recommended by the Proponents (Exhibit 32, p. 4), reads as follows:

The committee shall, with the approval of the Secretary, establish such reporting and disposition procedures as it deems necessary to ensure that pistachios which do not meet the outgoing maximum aflatoxin tolerance and minimum quality requirements prescribed by §§ 983.38 and 983.39 shall not be shipped for domestic human consumption.

8. Modification.

§ 983.46 Modification or Suspension of Regulations

Section 983.46 deals with changes in the regulation sections of the proposed order in the Federal Register, §§ 983.38 through 983.45. At the hearing the Proponents recommended that § 983.46 be amended to ensure that changes in the regulations in §§ 983.38 through 983.45 could be recommended to the Secretary with at least seven concurring members of the administrative committee, and that by simple majority the committee, with the approval of the Secretary, could issue rules and regulations implementing §§ 983.38 through 983.45. (Hearing Record, pp. 838-840, Exhibit 49.) This change would amend § 983.46(a) and add a new § 983.46(c) to read as follows:

(a) In the event that the Committee, at any time, finds that, by reason of changed conditions, the regulations contained in § 983.38 through § 983.45 should be modified or suspended, it shall by a vote of at least seven concurring members, so recommend to the Secretary.

(c) The committee, with the approval of the Secretary, may issue rules and regulations implementing §§ 983.38 through 983.45.

REPORTS, BOOKS AND RECORDS AND
EXPENSES AND ASSESSMENTS

§ 983.47 - § 983.56

Sections 983.47 through 983.56 provide for books, records, assessments and accounting for the money received from handlers in the administration of the proposed order by the committee. The Proponents intend that all of these provisions could be amended and implemented by informal rulemaking initiated by a majority vote of the committee voting for the recommendation to the Secretary. (Hearing Record, p. 843.) Accordingly, with subsequent sections renumbered, a new § 983.57 should be added to read as follows:

§ 983.57 Implementation and Amendments.

The Secretary, upon the recommendation of a majority of the Committee, may issue rules and regulations implementing or modifying § 983.47 through § 983.56, inclusive.

§ 983.49 *Records*

Section 983.49 requires that handlers maintain records of pistachios received, held and shipped by them as will substantiate any required reports, and show performance under the order. To make the retention of records uniform, the Proponents recommend that the period of retention be three years under § 983.49, as proposed under § 983.38(d)(5). Both sections should require retention for three years beyond the crop year of their applicability. (Hearing Record, pp. 847-848.)

Accordingly, in § 983.49 the reference to § 983.38(d)(5) should be deleted, two years changed to three years, and the reference to the records being retained for three years beyond the crop year of their applicability should be added. As amended, § 983.49 would read as follows:

Records of pistachios received, held and shipped that will substantiate any required reports showing performance under this part will be maintained by each handler for at least three years beyond the crop year of their applicability.

EXPENSES AND ASSESSMENTS

§ 983.53 *Assessments*

Section 983.53(b) provides for the recommendation of a budget to the Secretary for operation of the committee. The last sentence as printed in the Federal Register provided that the revisions of the assessments established prior to October 1 of each year should be changed "prior to the date established for payment of the assessment." This left some ambiguity as to when the change in the assessment could be made. To eliminate this possible confusion, the Proponents recommend that the committee, as necessary, be permitted to adjust the rate of assessment with the Secretary's approval at any time before the final billing is made for the assessment. For example, this could arise if projections are inaccurate or if the pistachio crop is less than predicted and insufficient to meet the needs of the projected budget. (Hearing Record, p. 592, Exhibit 34, p. 3.) As recommended by the Proponents, § 983.53(b) would read as follows:

(b) The committee, prior to the beginning of each production year, shall recommend and the Secretary shall set the assessments for the following production year, which shall not exceed one-half of one percent of the average price received by producers in the proceeding production year. The committee with the approval of the Secretary, may revise the assessments if it determines, based on information including crop size and value, that the action is necessary, and if the revision does not exceed the assessment limitation specified in this section and is made prior to the final payment of the assessment.

§ 983.55 *Delinquent Assessments.*

Section 983.55 provides for the treatment of handlers who fail to report or pay assessments as required under the proposed order. To clarify § 983.55, the reference to "return" should be changed to "report" to insure that if handlers fail to comply with the reporting requirements of § 983.47 as the committee, with the approval of the Secretary will require, they will be subject to the sanctions provided in § 983.55. In addition, the last sentence in § 983.55(a) is out of place and is not needed with the change in § 983.53(b). (Hearing Record, p. 845; Exhibit 34, p. 8.)

Accordingly, § 983.55(a) as worded in the Federal Register should be revised to read as follows:

(a) Any handler who fails to file a report or other information as be required under § 983.47 or pay any assessment within the time required by the committee, shall pay to the committee a penalty of 10 percent of the amount of the assessment determined to be past due and, in addition, interest on the unpaid balance at the rate of one and one-half percent per month. If delinquent for more than 60 days, then the committee can request that USDA stop providing certificates to the delinquent handler.

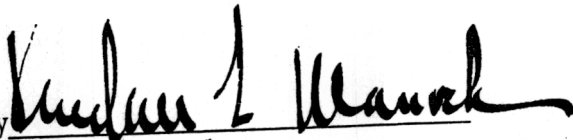
CONCLUSION

Based on the testimony and the exhibits at the hearing on the Proposed Marketing Order for Pistachios Grown in California, held on July 23, 24 and 25, 2002, the Proponents Committee recommends that the Secretary of Agriculture issue a federal marketing order in the form printed in the Federal Register for June 26, 2002, as modified at the hearing and in this brief.

Dated: September 20, 2002

Respectfully submitted,

BAKER, MANOCK & JENSEN

By 

Kendall L. Manock

Robert D. Wilkinson

Attorneys for THE PROPONENTS COMMITTEE
FOR A FEDERAL MARKETING ORDER FOR
PISTACHIOS